Supreme Court, U.S.
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No. 99-1904

In The

Supreme Court of the United States

I&M RAIL LINK,

Petitioner,

v.

NORTHSTAR NAVIGATION, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Sabula Railroad Bridge is owned by Petitioner and is one of the most frequently struck bridges in the Midwestern United States. The Coast Guard declared the bridge an unreasonable obstruction to navigation in 1995. On May 5, 1996, Respondent's vessel struck the bridge when attempting to navigate its narrow spans. In the ensuing litigation, the district court concluded that Respondent's vessel should be presumed at fault and that it had not rebutted that presumption at the summary judgment stage. The court therefore granted summary judgment against Respondent. The Seventh Circuit Court of Appeals reversed the district court grant of summary judgment and remanded the case for trial on the merits.

The issue presented is:

Whether Respondent is entitled to present its evidence at trial regarding the parties' respective liability for this accident.

DISCLOSURE STATEMENT

Northstar Navigation, Inc. has no parent corporation, and no shareholders that are publicly held companies.

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STATUTES INVOLVED

33 U.S.C. § 512. Obstruction to Navigation

No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States.

STATEMENT OF THE CASE

This case reaches the Court at the summary judgment stage. Trial is scheduled for later this year. Records submitted in support of and opposition to the summary judgment motion suggest the following:

Petitioner I&M Rail Link ("Petitioner") owns the 100 year-old Sabula Railroad Bridge ("the Bridge"), which spans the Mississippi River (Appx. 1). Rather than having one wide channel opening or "span" in the center of the river, the bridge has two narrow spans along the western bank (Appx. 3). Downbound vessels, while being pushed by river currents as they approach the Bridge, must navigate toward the right descending bank and hug the Iowa shore (Appx. 47). The river current near the Iowa bank is erratic, first pushing the vessel towards the bank and, immediately above the Bridge, deflecting the vessel away from the bank (Appx. 92-93, ¶ 3; 102-03, ¶ 4). This precarious approach, necessitated by the configuration of the Bridge, makes it one of the most frequently struck bridges in the entire Midwestern United States (Appx. 50).

After receiving many complaints from vessel owners and operators over the years, and following numerous

accidents at the Bridge, the United States Coast Guard initiated an investigation in 1994 into the obstructive character of the Bridge (Appx. 58-59). The Coast Guard investigated the hazards and damages caused there over the years, accepted public comment, and held a public hearing (Appx. 58). On September 27, 1995, the Coast Guard issued a detailed report of its findings, with the conclusion that the Bridge posed an "unreasonable obstruction to navigation" and should be modified by its owner (Appx. 58, 73). The Coast Guard reached this conclusion after finding 63 significant accidents at the Bridge between 1980 and 1990, causing millions of dollars in damage (Appx. 58). The Coast Guard report on the Bridge states:

> The restricted channel width, position of the bridge, shallow water depths near the bridge, and severe cross currents all combine to pose serious problems in getting aligned for the bridge approach, even for the most experienced pilots. Safe transit of the restrictive navigation span requires extensive tow maneuvering. . . .
>
> During periods of high water the narrow horizontal opening makes it virtually impossible for tows to transit the bridge without contacting the bridge piers or protection cells. The use of helper boats becomes necessary, a practice that by itself is considered unsafe by many pilots since it requires the helper boat to transit the bridge backwards while attached to the head of the tow. . . .
>
> . . .
>
> The horizontal opening of 154 feet does not provide adequate clearance for contemporary

> commercial tows. This leaves about 24 feet of clearance on each side of the tow when transiting the bridge. This requires commercial tows to be perfectly aligned with the opening when approaching and transiting the bridge to avoid contacting the bridge. This is not what the navigational characteristics of the waterway dictate.

(Appx. 59-60).

Because of the dangers posed by the Bridge, the Commandant of the Coast Guard on June 17, 1996, ordered the Bridge owner to provide a channel opening at least 300 feet wide (Appx. 77), creating greater clearance for downbound vessels, allowing downbound vessels to push ahead on their engines and steer the Bridge (rather than backing on their engines and "flanking" the Bridge), thereby avoiding the hazards associated with wind and current at that location (Appx. 96-97, ¶ 16; 103-04, ¶ 8).

Petitioner has not taken any steps to comply with the Coast Guard's order. Other bridge owners on the Mississippi River have widened to 300 feet the narrow passages similar to those that currently exist at Petitioner's bridge, and accidents at those bridges have been virtually nonexistent since those alterations (Appx. 96-97, ¶ 16; 103-04, ¶ 8). The accident at issue in this case would not have occurred if Petitioner had widened the channel at the Bridge to 300 feet as the Coast Guard previously mandated (Appx. 96-97, ¶ 16; 103-04, ¶ 8).

On May 5, 1997, Respondent's vessel, the M/V Megan Beesecker, slowly approached the Bridge shoving 12 loaded barges while downbound on the Mississippi River. When the boat passed below an island just upriver

from the Bridge, pilot James Jarvis first noticed wind from the north/northwest. When the boat was approximately ½ mile above the Bridge, those winds gusted, causing the boat and stern of the tow to drift slightly toward the center of the river. Pilot Jarvis does not know if the vessel would have stopped at that point had he attempted to put the engines in full reverse. He is certain, however, that if he had attempted to stop, he would have lost control over his ship, and a collision would have been unavoidable had that stopping attempt failed. To maintain control over his vessel during that situation, he attempted to correct the alignment by maneuvering the boat to compensate for the drift. He believed at the time, and continues to believe to this day, that seeking to correct the alignment of the boat rather than attempting to stop and abandoning control was a reasonable decision. Along with Mr. Jarvis, every other witness believes that these decisions were reasonable, and Mr. Jarvis' efforts to control the situation demonstrated prudent seamanship (Appx. 94-95).

The M/V Megan Beesecker entered the Illinois span of the Bridge slightly angled (Appx. 48). Because the wind and current pushed the boat and tow out of perfect alignment with the Bridge span, one of the barges contacted the protective structures surrounding the Bridge. The structures extend upstream and downstream of the Bridge piers, and are designed to protect the Bridge and vessels passing through the span at the Bridge (Appx. 86). However, Petitioner had allowed the protective structures to deteriorate to the point where they were virtually worthless (Appx. 104, ¶ 9). When a barge in tow of the

M/V Megan Beesecker contacted those structures, the Bridge, barges and the vessel sustained damage.

Petitioner filed suit against Respondent for bridge damage and Respondent counterclaimed against Petitioner for damage to the boat and barges. Petitioner moved for summary judgment, asserting that Respondent was entirely at fault for the accident. The district court granted that motion, invoking the presumption commonly called *The Oregon* Rule, which creates a presumption of fault against a vessel striking a fixed object. The appellate court reversed, holding that Respondent was entitled to present evidence of liability at trial.

The opinion by the three-judge panel of the Seventh Circuit Court of Appeals remanding the case for trial was unanimous. When Petitioner submitted its petition for rehearing to the three-judge panel, each of those judges voted to deny the petition. When the Seventh Circuit circulated Petitioner's petition for rehearing en banc, not one judge called for a vote on that petition.

REASONS FOR DENYING THE WRIT

This is an interlocutory appeal. No party has yet been deemed liable to the other party. The appellate court ruled that the district court erroneously granted summary judgment, and remanded the case for trial. The central issue before this Court is whether Respondent should be entitled to present evidence of the parties' liability at trial. This Court ought not expend its

resources or that of the parties on an order from the appellate court which has yet to resolve the liability of any party.

Additionally, this Court may never reach the question presented by the Petitioner, because the district court order was erroneous for reasons beyond that raised in Petitioner's brief. Even if Respondent should have been presumed at fault as Petitioner contends, Respondent submitted ample evidence to rebut that presumption, which entitled Respondent to present evidence at trial regarding the parties' respective liability. Specifically, Respondent presented evidence that Mr. Jarvis acted prudently in all stages of his approach to the Bridge, while no witness or other evidence suggested that Mr. Jarvis acted imprudently. Additionally, the record shows that the Bridge failed to conform to its permit, and that Petitioner allowed its bridge to fall into disrepair. Each of these facts prevented Petitioner from relying on a presumption of fault against Respondent, or from obtaining summary judgment on Petitioner's own liability. Accordingly, the district court order granting summary judgment should not be sustained, regardless of this Court's ruling on Petitioner's question presented.

Petitioner addresses none of these issues in its brief, but proffers other arguments for consuming this Court's time and the parties' expense in this appeal. The submitted arguments are without merit and the Petition for Writ of Certiorari should be denied.

1. The Panel Decision promotes safety and is consistent with prior decisions.

Petitioner erroneously contends that the "Seventh Circuit's decision causes a profound reversal of the rules of admiralty law with harmful consequences." (Pet. at 10). To the contrary, the Seventh Circuit opinion will promote safety, and the opinion is consistent with and mandated by admiralty law.

As an initial matter, Petitioner's credibility in promoting safety on navigable waters is dubious. Petitioner's bridge has caused millions of dollars in damage to vessels over the years. In spite of the Coast Guard's order compelling Petitioner to fix its bridge so as to eliminate scores of accidents every year, Petitioner has done nothing. What Petitioner seeks is not navigational safety, but avoidance of a judicial incentive to modify its bridge to render the river near Sabula safer. The appellate court decision promotes maritime safety by compelling Petitioner to rectify the extreme dangers posed by its bridge. Petitioner's asserted concern with navigational interests is simply specious.

Petitioner contends that, because the appellate court held *The Oregon* Rule inapplicable in this case, river pilots will no longer exercise reasonable care when traversing its bridge. This argument, too, is pure sophistry. The appellate court opinion fashions no change in the imposition of liability against negligent vessel operators: "Because admiralty uses a comparative-fault regime, the possibility that Jarvis [the vessel pilot] and the bridge's

design each bear some responsibility cannot be overlooked." *I&M Rail Link v. Northstar Nav., Inc.*, 198 F.3d 1012, 1016 (7th Cir. 1999). If a vessel strikes the bridge because of the vessel's unsafe practices, that fault will result in liability proportionate to the vessel's share of responsibility for the accident. That potential liability, in addition to the obvious desire of any vessel to avoid placing the crew at peril, is certainly adequate to encourage safe navigation.

More significantly, the appellate court opinion recognizes that bridge owners must eradicate their own unsafe practices. The Bridge has for decades been the site of countless accidents, yet its owners have sat idly by, wholly expecting the risk of injury and the cost of repairs to fall entirely upon vessel operators. This expectation by Petitioner contravenes numerous decisions. For example, *Central Rivers Towing, Inc., v. City of Beardstown*, 750 F.2d 565, 569 (7th Cir. 1984), dismissed the argument raised by Petitioner here that the issuance of a permit to build a bridge forever immunizes a bridge owner from any form of liability: "Permission to erect such a bridge . . . does not give an indefinite right to maintain it under changed conditions. . . . Granting that the bridge involved here was a reasonable obstruction when it was built, . . . it [later] became an unreasonable obstruction, for whose existence the railroad was responsible."). In *Folkstone Maritime, Ltd., v. CSX Corp.*, 64 F.3d 1037 (7th Cir. 1995), the court disregarded *The Oregon* presumption where a bridge "impeded navigation more than [was] absolutely necessary." As the court there stated, "Admiralty law thus makes clear that a bridge may not unreasonably obstruct free navigation. Indeed, federal statutory law

stipulates that bridges may not 'unreasonably obstruct the free navigation of any navigable waters.' " *Id.* at 1048. In *Rodi Yachts, Inc. v. National Marine, Inc.*, 984 F.2d 880 (7th Cir. 1993), the court rejected blind application of *The Oregon* Rule advocated by Petitioners:

> Because American law is too complex and should where possible be simplified, we are sympathetic to the suggestion that " 'negligence' at sea does not differ, in principle, from 'negligence' ashore," *Grant, Gilmore & Charles L. Black, Jr.*, THE LAW OF ADMIRALTY § 7-11 at p. 509 (1975), implying that special presumptions applicable only to proof of negligence in admiralty cases should be shunned.

Id. at 886.

Nothing prohibits bridge owners from remedying unsafe conditions at their bridges without awaiting an order from the Coast Guard. Indeed, lower court opinions mandate such action, which is much more consistent with encouraging safe navigation than the position proffered by Petitioner. The appellate court decision simply applies both common sense and precedent to avoid the absurd result that Petitioner seeks – to force vessel operators to pay for damage caused by its bridge.

Petitioner forecasts that, because of the appellate court decision, thousands of " 'new' federal lawsuits will be filed on behalf of marine lines against bridge owners. . . . " (Pet. at 14-15). Petitioner cites not one case that has been filed in the six months since the Seventh Circuit issued its decision in this case. If the appellate court created new law at all, its effect has been more of a drip than the flood forecast by Petitioner.

Petitioner claims that "wholesale injustice" will result without blind application of *The Oregon* Rule (Pet. at 15). Petitioner's advocacy misconstrues the purpose of that rule. Presuming that a moving vessel is at fault when it strikes a stationary object is premised in "the common-sense observation that moving vessels do not usually collide with stationary objects unless the vessel is mishandled in some way." *Folkstone*, 64 F.3d at 1050. *The Oregon* Rule has never been rigidly applied to allisions *See, e.g., Folkstone*, 64 F.3d at 1050-51 ("as a matter of pragmatic necessity, *The Oregon* Rule is not susceptible to rigid application in the case of a drawbridge."), and "must be applied in a 'common sense' manner that is rooted in 'logic and experience.' " *Id.* at 1050. Vessels that strike unreasonable obstructions to navigation are not necessarily mishandled. Indeed, *The Oregon* Rule has always been subject to exceptions, including when, as here, the stationary object is guilty of fault. *See, e.g., Folkstone*, 64 F.3d at 1050; *Alamo Barge Lines, Inc. v. Rim Maritime Co.*, 596 F. Supp. 1026, 1033 (E.D. La. 1984) (vessel anchored in violation of law cannot rely on presumption of negligence when struck by moving vessel). *The Oregon* Rule in no way mandates the blind imposition of liability against a vessel that, as the evidence shows here, is not at fault. To the contrary, overwhelming authority rejects such an approach. *See, e.g., Folkstone Maritime, Ltd. v. CSX Corp.*, 64 F.3d 1037 (7th Cir. 1995); *Central Rivers Towing, Inc. v. City of Beardstown*, 750 F.2d 565 (7th Cir. 1984). Petitioner cannot be allowed, as a matter of law, to seek refuge in a 100 year-old permit that fact witnesses, expert witnesses, and the U.S. Coast Guard found dangerously outdated. The panel's decision

does not alter 100 years of admiralty law, but instead follows it.

II. The appellate court decision harmonizes regulation of safety on waterways.

Petitioner next contends that the Seventh Circuit's reconciliation of two statutory provisions of the U.S. Code will alter the interplay of various entities impacted by those statutes. This assertion is neither accurate nor significant.

Petitioner first contends that the panel decision will change the non-adversarial Truman-Hobbs proceeding into an adversarial one between bridge owners and the Coast Guard. However, the Truman-Hobbs Act already provides for such an adversarial proceeding:

> Whenever any bridge shall, in the opinion of the Secretary, at any time unreasonably obstruct such navigation, it shall be the duty of the Secretary, after notice to interested parties, to *hold a hearing at which the bridge owner*, those interested in water navigation thereunder or therethrough, those interested in either railroad or highway traffic thereover, and other party or parties in interest *shall have full opportunity to offer evidence and be heard* as to whether any alteration of such bridge is needed, and if so what alterations are needed, having due regard for the necessity of free and unobstructed water navigation and to the necessities of the rail or highway traffic.

33 U.S.C. § 513 (emphasis added).

In addition to the right to submit evidence, the bridge owner is entitled to appeal the Coast Guard's determination that a bridge is an unreasonable obstruction to navigation. 33 C.F.R. § 116.30(f). The owners of the Bridge in this case attended the hearing pertaining to its bridge, presumably received a full and fair hearing on the matter, and apparently decided not to appeal the Coast Guard's findings and order. It cannot now complain that the procedure was somehow unfair, was other than expected, or should be modified by this Court so the adversarial procedure contemplated by the Act becomes less adversarial.

Petitioner also contends that the ruling below is overturning decades of established maritime law, and cites *Folkstone Maritime, Ltd. v. CSX Corp.*, 64 F.3d 1037 (7th Cir. 1995), as the example of the precedent being overturned (Pet. at 18). According to Petitioner, the Seventh Circuit held in *Folkstone* that structures conforming to their permits cannot be characterized as negligent under admiralty law (Pet. at 18). *Folkstone* made no such ruling. *Folkstone* held that a bridge which did not conform to its permit was solely liable for an accident at that bridge. The court went on to note that "Liability for allisions may be imposed even in the absence of a statutory violation, if negligence was involved." *Folkstone*, 64 F.3d at 1046. Here, the Coast Guard ordered the Bridge owner to alter the Bridge, the permits themselves required modifications at the bridge owner's sole expense if the Bridge became an unreasonable obstruction to navigation (Appx. at 8, 73), the Bridge had been the site of numerous accidents for many years with no concern on the part of its owners for those hazards, and the Bridge deviated from

its permit in at least two respects (Appx. at 1, 58, 60, 79, 104). Nothing in the Seventh Circuit's opinion in *Folkstone* is inconsistent with the Seventh Circuit opinion in this case. Certainly the Seventh Circuit itself felt the two cases were consistent, as evidenced by the fact that no judge of that court voted to hear Petitioner's request for rehearing en banc. Petitioner's primary reliance on *Folkstone* underscores the weakness of Petitioner's argument that the opinion in this case has overturned decades of maritime law.

III. The appellate court decision upholds the clear legislative mandates.

Petitioner contends that making it pay for damages caused by its bridge is contrary to the intent of Congress, and is "economically irrational" (Pet. at 27). However, nowhere does the language of the statute or the legislative history suggest that a bridge owner is entitled to watch vessels strike its bridge every other week and do nothing to prevent those accidents. Petitioner cites no statute supporting its argument that a bridge owner can face no liability for every accident at its bridge. Instead, the relevant statute suggests quite the opposite: "No bridge shall *at any time* unreasonably obstruct the free navigation of any navigable waters of the United States." 33 U.S.C. § 512 (emphasis added). Petitioner seeks to rewrite the statute to allow unreasonable obstructions until the time when each bridge owner obtains federal funding to pay for modifications to its bridge, and that during the interim, vessel owners shall pay for all damage caused by the unreasonably obstructive character of

the bridge. Nothing in the language of the statute or the legislative history remotely suggests such a construction.

Petitioner contends that the ruling below improperly interpreted the Truman-Hobbs Act to repeal the common law. Specifically, Petitioner asserts that "Since the Truman-Hobbs Act made no reference to civil liability of bridges due to allisions, the common law of admiralty cannot be replaced by the Seventh Circuit's interpretation of the Truman-Hobbs Act." (Pet. at 25) However, the common law that Petitioner claims was repealed exists only in Petitioner's brief. The rule of *The Oregon* is the only rule cited by Petitioner, and that rule only creates an evidentiary presumption; *The Oregon* Rule does not create a cause of action, impose any liability, or defeat liability when a bridge is otherwise at fault. Moreover, the Seventh Circuit did not repeal *The Oregon*, but only applied that rule to this case in a manner consistent with prior decisions. *See, e.g., Wilmington Ry. Bridge Co. v. Franco-Ottoman Shipping Co.*, 259 F. 166, 169-70 (4th Cir. 1919) (Permitted bridge built with narrow passage for vessels cannot rely on *The Oregon* presumption: "[A]lthough the bridge was a lawful obstruction to navigation, the owners of the bridge, in making the charge of negligence, are burdened with the fact that they had chosen in its construction to leave little, if any, of that margin of safety which experience shows to be requisite to the avoidance of disaster, even when due care is exercised.") *Lauritzen v. Chesapeake Bay Bridge and Tunnel Dist.*, 259 F. Supp. 633, 638 (E.D. Va. 1966) (Violation by bridge of law pertaining to obstruction of navigable waters "gives rise to a presumption of negligence, which, if not rebutted, may result in liability to the negligent party."); *United States v.*

Illinois Term. RR., 501 F. Supp. 18, 20 (E.D. Mo. 1980) (lawfully erected bridge may become "an obstruction not 'affirmatively authorized by Congress.' "); *Alamo Barge Lines*, 596 F. Supp. 1026 (E.D. La. 1984) (party in violation of statute cannot invoke *The Oregon* presumption); *Central Rivers Touring*, 750 F.3d 565 (7th Cir. 1984) (bridge owner liable for conditions that unreasonably obstruct navigation); *Folkstone*, 64 F.3d 1037 (7th Cir. 1995) (bridge that impeded navigation more than necessary liable for accident).

IV. The appellate court ruling is consistent with precedent from other circuits.

Lastly, Petitioner postulates that the appellate court decision creates a conflict with two old Fifth Circuit cases, *Texas & P. Ry. v. Angola Transfer Co.*, 18 F.2d 18 (5th Cir. 1927), and *Seaboard Airline R.R. v. Pan Am. Petro. & Transp.*, 199 F.2d 761 (5th Cir. 1952). Even assuming that cases almost 70 and 50 years old, respectively, could suggest an inter-circuit conflict, the appellate decision at issue here is not in conflict with the Fifth Circuit. First, as the opinion below noted, neither of the Fifth Circuit cases cited or even discussed the Truman-Hobbs Act. In fact, *Angola Transfer* was decided before the Truman-Hobbs Act became law. Second, as discussed below, the cases are factually distinguishable and legally anachronistic.

Petitioner contends that *Angola Transfer* stands for the proposition that the construction of a bridge according to its original plans negates the possibility of a bridge becoming an unreasonable obstruction as a matter of law (Petitioner Pet. at 4). The facts of this 73 year-old case are

readily distinguishable from the case at bar. Unlike the bridge here, the Coast Guard had not declared the bridge in *Angola Transfer* an unreasonable obstruction to navigation. After a vessel struck the bridge in *Angola Transfer*, the vessel owner argued that the *initial construction* was improper, but the court rejected that avenue of liability because the bridge was "conclusively proven" at trial to have been built according to plans approved by the Secretary of War. *Angola Transfer*, 18 F.2d at 19. In this case, Petitioner's liability arises not because the initial construction of the bridge created an unreasonable obstruction to navigation, but because changed river conditions over the course of 100 years – of which Petitioner was or should have been aware – required it to take corrective measures.[1] *Angola Transfer* did not exclude the potential for a finding of liability due to changed conditions, but noted that the changed conditions in that case (the "highest [river] stage ever known") had existed for only a day or two, and "[t]here was nothing to put appellant on notice that an accident was likely to happen." *Id.* at 19-20. Here, the changed conditions at Sabula had existed for decades and accidents occurred regularly every month. *Angola Transfer* is entirely consistent with established precedent: "Permission to erect such a bridge . . . does not give an indefinite right to maintain it under changed conditions. . . . Granting that the bridge involved here was a reasonable and proper obstruction when it was built, . . . it [later] became an unreasonable obstruction,

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[1] As discussed above, evidence also shows the Sabula bridge fails to conform to its permit, which further distinguishes *Angola Transfer*.

for whose existence the railroad was responsible." *Central Rivers Towing, Inc. v. City of Beardstown*, 750 F.2d 565, 569 (7th Cir. 1984).

The other case cited by Petitioner, *Seaboard Airline*, resulted in the Fifth Circuit placing full responsibility for an allision on a negligent vessel. *Seaboard Airline* is distinguishable from the case at bar and is of doubtful validity within its own circuit today. Unlike this case, the ruling in *Seaboard Airline* came after trial, at which point the Fifth Circuit noted that the evidence showed all fault should be apportioned to the vessel, which failed to exercise reasonable care in navigating the bridge. Here, trial has yet to occur, and not one shred of evidence shows that the pilot of Respondent's boat exercised imprudent seamanship.

Moreover, unlike the bridge here, the bridge in *Seaboard Airline* could be navigated safely by exercising due care ("passage can be safely made under the conditions if due care is exercised." *Id.* at 765), whereas the bridge here becomes "virtually impossible" to navigate during periods of high water (Appx. at 59-60), which existed to some degree at the time of the accident involved here (Appx. 21-22 & 88-89). Because this bridge could not be safely navigated at the time of the accident despite the use of due care, *Seaboard Airline* does not compel assessing full responsibility for this accident on Respondent.

Seaboard Airline is also of doubtful validity within its own circuit. *Seaboard Airline* applied the "active-passive" negligence doctrine then followed by most admiralty courts, and concluded that the stationary bridge there was only passively negligent, that the moving vessel was actively negligent, and the actively negligent vessel

should bear all responsibility for the accident. Comparative fault was not a recognized aspect of maritime law at the time the Fifth Circuit decided *Seaboard Airline*. The active-passive distinction in admiralty has since been rejected by the Fifth Circuit (*see, e.g., Loose v. Offshore Nav., Inc.*, 670 F.2d 493, 502 (5th Cir. 1982) ("the concepts of active and passive negligence have no place in a liability system that considers the facts of each case and assesses and apportions damages among joint tortfeasors according to the degree of responsibility of each party.") and by other circuits:

> We hold that, where the violation of a statutory duty is a cause of an accident, that liability may not be avoided on causal grounds by drawing distinctions between active and passive negligence. . . . To excuse the negligence which narrows a navigable channel would, in our opinion, simply frustrate the congressional purpose to safeguard navigation. This view accords with the rationale underlying the decision in *The Pennsylvania*, [86 U.S. 125 (1873)]. The result we reach is in accord with the decisions in *In re Wasson*, 495 F.2d 571 (7th Cir. 1974). . . .

In re tug Helen B. Moran, Inc., 560 F.2d 527 (2nd Cir. 1977). If *Seaboard Airline* were decided today, the Fifth Circuit would likely reach a different result. If presented with the facts of this case, the Fifth Circuit would almost certainly reach the same result reached by the appellate court here.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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